

FTC Disclosure Guide Signals More Influencer Scrutiny

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A recent 2018 report disclosed that almost three-quarters of U.S. millennials and their Gen Z successors follow social media influencers, and the majority say they trust influencers more than their favorite celebrities when it comes to advice about products or brands.

Authenticity and genuinely caring about consumer interests are the most important traits when deciding whether to follow an influencer on social media. With the growth of influencers' ability to reach and persuade significant portions of the population, their role has come under increasing scrutiny by the Federal Trade Commission.

On Nov. 5, the FTC issued a guide titled "Disclosures 101 for Social Media Influencers" and a video titled "Do you endorse things on social media?" While the ostensible purpose of this guide and video is to educate influencers about the FTC rules governing the endorsement of products or services and to provide "tips on when and how to make good disclosures," the other reality is that the FTC and other regulatory agencies internationally are scrutinizing influencers and the advertisers that work with them.

As recent FTC actions indicate, the subjects of enforcement include not only influencers, but also advertisers, native advertisers and companies that sell followers.

FTC Puts Influencers on Notice

The FTC's new guide alerts influencers that "[as] an influencer, it's your responsibility to make these disclosures, to be familiar with the endorsement guides, and to comply with laws against deceptive ads." The guide explains that disclosures must be made when an influencer has a material connection, that is "any financial, employment, personal, or family relationship with a brand" and that receiving "free or discounted products or other perks" requires a disclosure.

The FTC's guide also notes that "tags, likes, pins, and similar ways of showing you like a brand or product are endorsements" and instructs influencers that: "If posting from abroad, U.S. law applies if it's reasonably foreseeable that the post will affect U.S. consumers. Foreign laws might also apply." The FTC guide states that disclosures must be in simple and clear language and placed so they are hard to miss within the endorsement itself. Disclosures that "appear only on an about me or profile page, at the end of posts or videos, or anywhere that requires a person to click more" will not be sufficient.

The FTC provided the following guidance for posting photographs, videos and live streaming in endorsement posts:

1. "If your endorsement is in a picture on a platform like Snapchat and Instagram stories, superimpose the disclosure over the picture and make sure viewers have enough time to notice and read it";
2. "If making an endorsement in a video, the disclosure should be in the video and not just in the description uploaded with the video. Viewers are more likely to notice disclosures made in both audio and video. Some viewers may watch without sound and others may not notice superimposed words"; and
3. "If making an endorsement in a live stream, the disclosure should be repeated periodically so viewers who only see part of the stream will get the disclosure."

The FTC underscores the fact that any endorsement, review or evaluation needs to be truthful and based upon actual experience. Simple explanations such as "Thanks to Acme brand for the fine product" may suffice if placed conspicuously. The following terms also provide proper notice, with or without a hashtag:

- Advertisement;
- Ad;
- Sponsored;
- Acme Partner; or
- Acme Ambassador.

It should be noted that shortened versions of the foregoing (sp, spon or collab) or "ambassador" or "thanks" do not provide proper disclosure because the FTC considers these vague and confusing.

FTC Takes Action Against False Social Media Reviews

On Oct. 21, the FTC announced a consent order in an action for violation of Section 5 of the FTC Act against Sunday Riley Modern Skincare LLC, or SRMS, and its CEO Sunday Riley for allegedly posting false reviews of its products and falsely representing that the reviews reflected the views of ordinary customers. SMRS skincare products have enjoyed tremendous success, having been featured, promoted and sold online through the company's website and retailers, including Sephora SA.

The complaint alleged that from 2015 until 2017 SRMS managers, including Riley, posted fake reviews on the Sephora website, using false accounts to conceal their identities and directed SRMS employees to do the same. The FTC's proposed consent order provides:

1. Riley and SRMS are prohibited from misrepresenting the status of any endorser or reviewer of a product;

2. Riley and SRMS are required to clearly disclose any unexpected material connection between SRMS and anyone reviewing a product;
3. Riley and SRMS are required to instruct employees, officers and agents as to their responsibilities for disclosing their connections to SRMS and any Sunday Riley product they endorse and that SRMS obtain signed acknowledgments from any endorser; and
4. Riley and SRMS are required to submit compliance reports to the FTC within one year of the order and to create records for 20 years and retain them for five years.

FTC Commissioners Rebecca Kelly Slaughter and Rohit Chopra, noting the widespread nature of the problem, dissented and criticized the absence of a monetary penalty: "Going forward, the FTC should seek monetary consequences for fake review fraud, even if the exact level of ill-gotten gains is difficult to measure." Riley and SRMS had been the subject of a whistleblower tip to the FTC.

FTC Shuts Down Fake Influence Indicator Sales

The FTC recently sued now-defunct Devumi LLC and its owner and CEO, German Calas Jr., in the U.S. District Court for the Southern District of Florida for selling fake indicators of social media influence, including fake followers, subscribers, views and likes to social media platform users, including on LinkedIn, Twitter, YouTube, Pinterest, Vine and SoundCloud. Devumi agreed to settle the FTC's first-ever complaint challenging the sale of fake social media influence indicators for a monetary judgment against Calas for \$2.5 million, the amount that the FTC alleges he was paid by Devumi or its parent company.

The FTC alleged Devumi filled more than 58,000 orders for fake Twitter followers, more than 4,000 orders of fake YouTube subscribers, and over 32,000 sales of fake YouTube views to its clients. Devumi had been the subject of a 2018 New York Times investigation into social media fraud.

Best Practices and Takeaways

You need to take action because the FTC is taking action.

In 2017, the FTC issued written letters to influencers and brands giving notice that the FTC endorsement guides apply to influencers^[8] and social media. In 2018, the FTC took action against influencers.

The issuance of the 2019 guide is another effort by the FTC to step up enforcement and eliminate the possible defense that an influencer did not know that the endorsement guides and FTC laws apply to them and to ensure that influencers know that they need to make proper disclosures. While the FTC's resources are limited, the FTC will take action when it receives evidence of social media fraud.

Brands should use influencer agreements and must require compliance.

In light of the FTC's guidelines, any brand utilizing an influencer in a U.S. advertising campaign should have a proper agreement in place and include contractual provisions requiring compliance with the FTC endorsement guides. Brands need to instruct and contractually bind influencers with respect to their obligations for disclosing their connections and how to do so.

If there is failure to perform, the agreement should provide for termination of the influencer. Best practices require that brands monitor and follow up with any influencers they do business with to make sure that he or she has complied with disclosure obligations under the guidelines.

Clear and conspicuous disclosures are required.

Any U.S. endorser of a product is required to clearly and conspicuously disclose any material connection, including any financial or familial relationship, with anyone affiliated with the product or service. Brands and influencers cannot rely upon built-in disclosure tools.

For example, including the following on an Instagram or Twitter post is sufficient: #contest, #sweepstakes, #advertisement or #sponsored. For the disclosure, use a font and contrasting shade of type that is easy to read and stands out. Additionally, use hashtags that are relevant. For example, #sweeps is not sufficiently transparent to meet the FTC disclosure requirement for sweepstakes.

The threshold for what is material is low.

The FTC stated that "any financial, employment, personal, or family relationship with a brand" is material if knowing about the consideration given or connection to the endorser affects the weight or credibility that readers or viewers give to the endorsement; and the connection between an advertiser and an endorser (whether she or he is a tweeter or blogger or endorser on another online site) must be clearly disclosed.

While advertisers and marketers always want to create buzz and sizzle about new products, care should be taken to avoid violating the FTC Act when promoting new products in the online marketplace. As the FTC has recognized, truth-in-advertising principles apply on social media platforms, and if there is a material connection which could "consist of a business or family relationship, monetary payment, or the provision of free products" between an advertiser and an endorser (whether she or he is a tweeter or blogger or endorser on another online site), it has to be clearly disclosed.

As the FTC's endorsement guides make clear a material connection is a connection or relationship that might affect the weight or credibility a consumer would give the endorsement: "Whether knowing about the gift or incentive given by the brand to the social media influencer affects 'the weight or credibility' readers or viewers give to the recommendation." Endorsements must "reflect the honest opinions, findings, beliefs, or experience of the endorser" but disclosure of one's relationship with the product is required.